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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

DA 95-1867

In the Matter of	)	
	)	Transmittal Nos. 2433 and 2449
Southwestern Bell Telephone Company	)	
	)	CC Docket No. 95-140
Tariff F.C.C No. 73	)	

**ORDER DESIGNATING ISSUES FOR INVESTIGATION**

Adopted: August 24, 1995 ; Released: August 25, 1995

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION**

1. On June 26, 1995, pursuant to its authority under Section 204(a) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 204(a), the Common Carrier Bureau (Bureau) released an Order that suspended for five months the "Request for Proposal" (RFP) tariffs filed with Southwestern Bell's (SWB) Transmittal Nos. 2433 and 2449, and initiated an investigation into the lawfulness of these tariffs.<sup>1</sup> In this Order we designate various issues for investigation.

**II. BACKGROUND**

2. On February 27, 1995, SWB filed Transmittal No. 2433 to introduce a new section 29, "Request for Proposal," to its access tariff.<sup>2</sup> This tariff section purports to establish how SWB will respond to requests for proposals (RFPs) from its customers. As originally filed, SWB listed MCI Telecommunications Corporation (MCI) as a customer issuing a RFP. On April 24, 1995, SWB filed Transmittal No. 2449 to clarify the general availability of an offering made in response to a RFP to similarly situated customers. Transmittal No. 2449 also amended the tariff language to remove references to MCI, which had withdrawn its RFP.

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<sup>1</sup> Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal Nos. 4233 and 2449, Order, DA 95-1445 (rel. June 26, 1995) (*Suspension Order*).

<sup>2</sup> The transmittal was originally scheduled to become effective April 13, 1995. The Tariff Division ordered that the effective date be deferred until June 27, 1995.

3. In its proposed tariff language, SWB describes a RFP rate as its response to customer RFPs submitted to SWB in "competitive bid situations." The tariff requires that a customer indicate in its RFP that the request involves a "competitive bid situation" in order to avail itself of SWB's application-specific rates. In addition, the tariff states that the rates quoted to a customer in response to a RFP are available to any similarly situated customer that submits a RFP requesting the same service in the same quantities and at the same central office(s). SWB does not name any competitors or potential customers in the tariff, but includes rates and charges in the tariff for two specific offerings that were developed in response to RFPs that later were withdrawn.

4. In the Description and Justification (D&J) submitted with Transmittal No. 2433, SWB states that it received a request from MCI for a "competitive response" to two RFPs for service through SWB's interstate access tariff. SWB claims that none of the policies in the Commission's *DS-3 ICB Order*,<sup>3</sup> or elsewhere, prohibit SWB from responding to a customer with an application-specific rate package, and that competitive conditions justify this tariff filing.<sup>4</sup> SWB interprets the Commission's *DS-3 ICB Order* as permitting individually negotiated contract rates whenever there exists "competitive necessity" as defined in the Commission's *Private Line Guidelines Order*.<sup>5</sup> SWB claims that its offering satisfies the requirements for "competitive necessity" as set forth in the *Private Line Guidelines Order* and, therefore, a waiver of the *DS-3 ICB Order* is not necessary.<sup>6</sup>

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<sup>3</sup> Local Exchange Carriers' Individual Case Basis DS-3 Service Offerings, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*DS-3 ICB Order*).

<sup>4</sup> SWB D&J at 2 (citing the *DS-3 ICB Order*). In its *DS-3 ICB Order*, the Commission found that ICB pricing of DS-3 service will be presumed discriminatory but that discrimination that results from ICB pricing of a very limited number of DS-3s as a transitional mechanism to a general rate offering is not unreasonable. The Order also stated that although the LECs frequently invoke "competitive necessity" as a justification for ICB pricing, none of the carriers had made a showing of competitive necessity that met the Commission's requirements. *DS-3 ICB Order*, 4 FCC Rcd 8634.

<sup>5</sup> *Id.* at 2, (citing the *DS-3 ICB Order* at 8643). In finding that none of the LECs had made a showing of "competitive necessity" that meets the Commission's requirements, the *DS-3 ICB Order* cited to Private Line Rate Structure and Volume Discount Practices, Report and Order, CC Docket No. 79-246, 97 FCC 2d 923 (1984) (*Private Line Guidelines Order*). The *Private Line Guidelines Order* states that a carrier's proof of competitive necessity should include a showing that: (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. *Private Line Guidelines Order*, 97 FCC 2d at 948.

<sup>6</sup> SWB D&J at 3.

### III. DISCUSSION

#### A. Tariff Language Vagueness and Ambiguity

5. *Pleadings.* AT&T states that the Commission recently rejected a substantially similar tariff filed by SWB to offer special rates for DS-3 or other existing services "in response to a bona fide request from a customer or potential customer."<sup>7</sup> AT&T states that the Bureau found that the language in the proposed tariff violated Sections 61.2 and 61.54(j) of the Commission's rules,<sup>8</sup> which require that tariff publications be worded clearly and explicitly.<sup>9</sup> AT&T alleges that the same deficiencies pervade SWB's present tariff filing. AT&T further alleges that the present tariff filing does not specify which access services may be offered in response to an RFP and that there exists facial ambiguity and indefiniteness with respect to the reference to "competitive bid situations."<sup>10</sup> SWB does not reply to this argument.

6. *Discussion.* As we stated in the *Suspension Order*, we find ambiguities in the tariff language that raise substantial questions about whether the discounted services to be offered by SWB are generally available and whether any restrictions placed on general availability are reasonable. We have reviewed the arguments of AT&T and find that investigation is warranted to determine whether tariff language in sections 29.2 and 29.3 is unreasonably vague and ambiguous.

7. *Information Requirement.* The Bureau orders SWB to file a direct case addressing the following questions:

a. SWB must state how it defines, and what standards it will use to determine what constitutes, a "competitive bid situation." In this context, SWB must state whether it would independently verify whether a customer or potential customer in fact requested other

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<sup>7</sup> *AT&T Petition at 4*, (citing *Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal No. 2297, Order*, 9 FCC Rcd 2683 (1994) (*SWB Tr. 2297 Order*)).

<sup>8</sup> See 47 C.F.R. §§ 61.2 and 61.54(j).

<sup>9</sup> *AT&T Petition at 4*, (citing *SWB Tr. 2297 Order at 2686*). In the *SWB Tr. 2297 Order*, the Bureau rejected the transmittals on the ground that they were unclear and ambiguous in violation of Sections 61.2 and 61.54(j) of the Commission's rules. The Bureau found that it was impossible to discern from the language how SWB would exercise its discretion in selecting the services to be provided as a special arrangement or the circumstances under which it would provide or deny that service to a particular customer. The Bureau also found that it was unclear from the face of the tariff what would constitute a *bona fide* request. *SWB Tr.No. 2297 Order at 2686*.

<sup>10</sup> *AT&T Petition at 4-5*.

competitive bids, whether a competitor in fact responded to such requests, and the terms of the competitor's offer. SWB must also address whether, if no other party responded to an RFP, such circumstances would constitute a "competitive bid situation." SWB must also comment on whether the existence of an outstanding bid from a competitor, in and of itself, regardless of the market share of that competitor, or the number of competitors in the relevant area as a whole, constitutes a "competitive bid situation."

b. SWB must explain how it will determine what constitutes a *bona fide* RFP, and whether and how its discretion to determine a bona fide RFP would be limited.

c. SWB must address whether it intends to limit the access services available under the tariff to the specific services proposed in Section 29.3.<sup>11</sup> If not, SWB must specifically identify what access services may be offered in response to an RFP.

d. SWB must identify the restrictions on the general availability of discounted services to be offered by SWB and explain why any such restrictions on availability are reasonable. Such restrictions might include, but are not limited to, restrictions based on geography, type of customer, and type of service.

## **B. Pricing Flexibility**

8. *Pleadings.* Both Teleport Communications Group, Inc. (TCG) and MCI Telecommunications Corporation (MCI) allege that SWB has already gained the ability to price certain high capacity services flexibly through zone density pricing for its expanded interconnection offerings in any particular study area.<sup>12</sup> MCI further argues that SWB may offer switched transport with volume and term discounts in any particular study area subject to certain conditions.<sup>13</sup> These parties argue that SWB is attempting to bypass established Commission policy and unilaterally implement increased pricing flexibility.<sup>14</sup>

9. SWB replies that MCI's and TCG's arguments relative to zone density pricing are outside the scope of this proceeding and should be ignored.

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<sup>11</sup> The access services currently proposed in section 29.3 are: (1) 8 DS3s between two customer premises each served by the Jackson central office in Topeka, Kansas, and (2) 15 DS3s between a customer premises served out of the Chestnut central office in St. Louis, Missouri and a customer premises served from the Ladue central office in Ladue, Missouri.

<sup>12</sup> TCG Petition at 4-5 and MCI Petition at 4-5, (citing Expanded Interconnection With Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) (*Virtual Collocation Order*)).

<sup>13</sup> MCI Petition at 5.

<sup>14</sup> TCG Petition at 5; MCI Petition at 5-6.

10. *Discussion.* As the *Suspension Order* noted, pursuant to the Commission's zone density pricing policy SWB has a zone density pricing structure in place for Missouri and Texas. In its 1995 annual access tariff filing, SWB has introduced tariff revisions to charge different rates in these zones. Of the two RFP-based special access services introduced in Transmittal Nos. 2433 and 2449, one is for customers in Topeka, Kansas, served by the Jackson central office. Zone Density pricing is not available in Kansas. The other service would be offered in Missouri at a zone two designated central office. These offerings of discounted service are ostensibly in response to competitive circumstances, yet are outside the areas where pricing flexibility has been contemplated in the Commission's policies relating to zone density pricing. We have reviewed the petitioners' arguments and find that investigation of the tariff's consistency with the Commission's zone density pricing policies is warranted.

11. *Information Requirement.* The Bureau orders SWB to address the following issues in its direct case:

a. SWB must explain why its RFP tariff is not an attempt to circumvent the zone density pricing and volume and term discount policies established by the Commission in prior Orders, and why its tariff is consistent with those policies. In this regard, SWB must either explain why the RFP tariff is consistent with the Commission's statements that it would not grant LECs broader pricing flexibility for special access and switched transport, such as individualized pricing in response to competitors' offerings, at this time, or why it is reasonable, and in the public interest, to grant SWB greater pricing flexibility than is currently permitted under the Commission's existing zone density pricing and volume and term discount pricing policies.<sup>15</sup>

b. SWB must explain why it is reasonable to conclude that an RFP's existence establishes competition sufficient to justify pricing flexibility when SWB may not have met the expanded interconnection proceeding's competition requirements for zone density pricing or volume and term discounts.

c. SWB must state whether and how RFP rates conform to the cost based pricing policies inherent in zone density pricing.

### C. **Competitive Necessity**

12. *Pleadings.* TCG claims that SWB has not demonstrated that high capacity services,

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<sup>15</sup> See *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, First Report and Order, 7 FCC Rcd 7369, 7457-58, ¶ 186 (1992); Second Report and Order, 8 FCC Rcd 7374, 7424-25, ¶ 94 (1993); Memorandum Opinion and Order, 9 FCC Rcd 5154, 5207, ¶ 195-96 (1994).

such as DS3, that are subject to the Commission's virtual collocation requirements, are so competitive that SWB should receive additional pricing flexibility.<sup>16</sup> TCG also argues that SWB is actually requesting authority to price DS-3 services on an individual case basis (ICB) and that the Commission has rejected the use of ICB pricing for DS-3 services by local exchange carriers.<sup>17</sup> MCI claims that SWB's RFP tariffs are contract type tariffs, the use of which the Commission has "limited to services found to be substantially competitive."<sup>18</sup> MCI states that the Commission has not determined that the interstate access market is subject to substantial competition.<sup>19</sup> MCI further claims that SWB's filing is not in the public interest because it could check competitive forces and ultimately quash competition.<sup>20</sup> Finally, AT&T argues that SWB's "competitive necessity" justification is based on demonstrably erroneous claims concerning the conditions SWB allegedly faces in the access marketplace.<sup>21</sup> AT&T claims that SWB fails to show that an equally or lower-priced offering is in fact "generally available" from SWB's access competitors.<sup>22</sup> AT&T argues that SWB fails to satisfy the remaining branches of the competitive necessity test. AT&T states that SWB provides no standards for making a determination regarding availability to "similarly situated" customers. In addition, AT&T argues that the criteria in the tariff for receiving an RFP rate are so vague as to give SWB almost unfettered discretion to grant or refuse requests from other access customers for a discounted service offering and that this discriminatory potential does not contribute to reasonable rates.<sup>23</sup>

13. SWB replies that: (1) its competitive necessity claim to the Bureau is supported by the fact it was informed by MCI that MCI would obtain service from another vendor; (2) MCI provides no support for its claim that the services at issue are not subject to competition, and therefore any inquiry as to whether SWB truly faces competition should not be initiated;<sup>24</sup> (3)

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<sup>16</sup> TCG Petition at 1-2. TCG claims that SWB has, in fact, obstructed competitors from using collocation and that the market is not substantially competitive due to SWB's own actions. *Id.* at 1-3.

<sup>17</sup> *Id.* at 2-3, (citing the *DS -3 ICB Order*).

<sup>18</sup> MCI Petition at 3, (citing Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase II, 9 FCC Rcd 2718, 2731 (1994)).

<sup>19</sup> MCI Petition at 3.

<sup>20</sup> *Id.* at 7.

<sup>21</sup> AT&T Petition at 1.

<sup>22</sup> *Id.* at 5-6.

<sup>23</sup> *Id.* at 6-7.

<sup>24</sup> SWB Reply at 2-3.

SWB's RFP offering is not a contract tariff offering but rather a general offering that allows for similarly situated customers to receive the benefit of this filing;<sup>25</sup> (4) SWB's RFP proposal is in the public interest because it gives customers the true benefits of competition; (5) SWB's filing does not violate the *DS-3 ICB Order*;<sup>26</sup> and (6) petitioners do not show that any other customers will, in fact, be unable to utilize the rates filed by SWB.<sup>27</sup>

14. *Discussion.* The *Private Line Guidelines Order* clearly states that "[w]e will assess the adequacy of the competitive-necessity justification on a case-by-case basis until we are able to develop additional standards in this area."<sup>28</sup> The *Private Line Guidelines Order* sets forth the competitive necessity justification in a three-part test.<sup>29</sup> We noted in the *Suspension Order*, however, that the *DS-3 ICB Order* does not establish that a showing of "competitive necessity" will always justify the filing of discriminatory rates.<sup>30</sup> We have reviewed the petitioners' arguments and find that investigation of the applicability and satisfaction of the competitive necessity test is warranted. We direct SWB to explain why in this case we should apply the three part competitive necessity test to it and why it meets the three criteria of the test.

15. *Information Requirement.* The Bureau orders SWB to address the following issues in its direct case:

a. Whether the services to be provided pursuant to SWB's responses to requests for proposals are "like" existing services offered by SWB; and if so, whether there is a discriminatory price difference between the rates charged to customers under the "competitive

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<sup>25</sup> According to SWB, customers would receive the benefit of this filing in two ways: (1) any customer with knowledge of the MCI RFP that wishes to purchase the services specifically covered by the filing is able to do so; and (2) any customer in other situations may obtain a similar rate by providing evidence of competition to SWB (pursuant to the tariff) and asking that a similar rate be developed for it. SWB Reply at 3-4.

<sup>26</sup> SWB Reply at 9-10.

<sup>27</sup> SWB Reply (Tr. 2449).

<sup>28</sup> *Private Line Guidelines Order*, 97 FCC 2d at 948.

<sup>29</sup> The *Private Line Guidelines Order* states that a carrier's proof of competitive necessity should include a showing that: (1) an equal or lower priced competitive alternative -- a similar offering or set of offerings from other common carriers or customer-owned systems -- is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. *Private Line Guidelines Order*, 97 FCC 2d at 948.

<sup>30</sup> See *DS-3 ICB Order*, 4 FCC Rcd at 8643.

response" situation and those charged to other customers.

b. Why competitive necessity justifies participation in a competitive bidding situation. SWB's comments must include, but need not be limited to:

i. an explanation of why it is appropriate to use the defense of competitive necessity to justify action (participation in the bidding process) that would be taken before the existence of a specific offer from a competing provider; and

ii. an explanation of how in a competitive bidding situation an offer by SWB could be reasonably designed to meet competition without undue discrimination.

c. Why a customer's release of a RFP constitutes a showing of the general availability of an equal or lower priced competitive offering to the customer. In this connection, SWB must comment on whether there should be verification requirements as to the terms of the competitors' offerings and as to their general availability to the competitors' customers.

d. How discounted rates offered in response to a RFP will contribute to reasonable rates and efficient services for all users.

#### **IV. PROCEDURAL MATTERS**

##### **A. Filing Schedules and Procedures**

16. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. SWB is designated as a party. SWB must file its direct case addressing each issue designated above no later than September 11, 1995.

17. Pleadings responding to SWB's direct case may be filed no later than September 25, 1995, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." SWB may file a "Rebuttal" to oppositions or comments no later than October 9, 1995.

18. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C., 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

19. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in



pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

**B. Ex Parte Requirements**

20. Ex parte contacts (i.e., written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a final Order is released and after the final Order itself is issued. Written ex parte contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, see generally Section 1.1200 et seq. of the Commission's Rules, 47 C.F.R. §§ 1.1200 et seq.

**V. ORDERING CLAUSES**

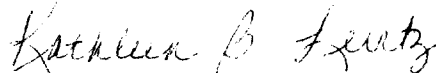
21. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

22. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL BE a party to this proceeding.

23. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company shall include a response to each item of information requested in Section III, supra, in its direct case

24. IT IS FURTHER ORDERED that this Order shall become effective on the date of its adoption.

**FEDERAL COMMUNICATIONS COMMISSION**



*for* Kathleen M. H. Wallman  
Chief, Common Carrier Bureau